IN THE

Supreme Court of the United States

October Term, 1972

No. 71-850

UNITED STATES OF AMERICA,
Petitioner,

v.

RICHARD J. MARA,
Witness Before the Special
September 1971 Grand Jury,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE FEDERAL COMMUNITY DEFENDER ORGANIZATION OF THE LEGAL AID SOCIETY OF NEW YORK, *AMICUS CURIAE*

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Interest of *Amicus**

Pursuant to 18 U.S.C. §§3006A (a)(2) and (h)(2)(B) (1971), The Legal Aid Society of New York was desig-

* Letters of Consent have been obtained from the Solicitor General of the United States and counsel for respondent, and are on file with the Clerk of the Court.

nated Community Defender Organization for the United States District Courts for the Southern and Eastern Districts of New York and for the United States Court of Appeals for the Second Circuit in cases arising in such District Courts. In that capacity, The Legal Aid Society represented Cynthia B. Schwartz in the proceedings brought by the United States seeking a judgment of civil contempt resulting from a refusal by Mrs. Schwartz to supply a handwriting exemplar requested by a grand jury of the Southern District of New York.

Mrs. Schwartz was adjudged to be in civil contempt and ordered to be imprisoned for thirty days or until such time as she complied with the direction of the foreman of the grand jury. Stays of the execution of sentence were granted successively by the District Court and the United States Court of Appeals for the Second Circuit. On March 28, 1972, the Court of Appeals affirmed the order adjudging Mrs. Schwartz to be guilty of civil contempt (457 F.2d 895).

A stay of execution of sentence was ordered by the Court on May 31, 1972 (Application No. A-926), and a petition for writ of certiorari was filed on April 17, 1972 on behalf of Mrs. Schwartz (Doc. No. 71-6522).

The issue presented by the petition filed on behalf of Mrs. Schwartz is identical to that in this case, and it is the purpose of this brief to assist the respondent in demonstrating that the Fourth Amendment applies to grand jury demands for handwriting exemplars.

Summary of Argument

Grand jury demands for the creation and production of identifying physical characteristics which are not in plain view are covered by the Fourth Amendment protection against unreasonable searches and seizures. The government's intrusion need not be a physical one; compulsion is a condemned intrusion when it is the method by which the government seeks to obtain the evidence. The constitutional protection does not depend upon whether the witness is properly called before the grand jury, but on whether the characteristic is protected. Further, the power of the grand jury to obtain evidence is not unlimited. A witness before the grand jury is protected by the Fifth Amendment. The government cites no authority for not affording Fourth Amendment protections to those witnesses and none articulating an unlimited power in the grand jury to secure nontestimonial evidence. A balancing of the function of the grand jury with the substantial right to be free of governmental intrusion produces an appropriate probable cause standard to be met by the government which would not interfere with the substantive scope of grand jury investigations and its traditional means of securing information and would prevent circumvention of the Fourth Amendment.

ARGUMENT

The Fourth Amendment protects identifying physical characteristics not in plain view from intrusions made by the grand jury and requires that the demand for the production of such characteristics be based upon an appropriate showing of probable cause.

I.

The Fourth Amendment guarantee of security to both persons and effects protects against government compulsion to produce handwriting exemplars. The individual's right against unreasonable intrusion of his person by government officials depends not only upon the nature of the intrusion, but upon the nature of the characteristic intruded upon. There are qualities of the "person" that cannot be searched or seized by the physical act of another person, as one would search or seize a house, paper, or effect, but must be obtained by compelling the individual to act, thus forcing him to create an effect for the government to seize, such as handwriting exemplars.* Thus, the unreasonable intrusion is the compulsion of otherwise voluntary cognitive creative behavior and the seizure of the effect produced by such behavior.

The government argues, from *United States* v. *Doe* (*Schwartz*), 457 F.2d 895, 898-9 (2d Cir. 1972), *cert. pending,* No. 71-6552, that the daily use of handwriting to communicate exposes that characteristic to the public at large so that it is no longer private (government brief at 15), and is thus not an item about which the individual can have a

* Production of evidence in this context is thus something much more than bringing it before the grand jury. It is the actual creation.

reasonable expectation of privacy. *See Katz* v. *United States,* 389 U.S. 347, 351 (1967). This is error. Both the government and the Second Circuit misapply to personal physical characteristics the language of *Katz* that

> * * * The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * * 389 U.S. at 351.

What *Katz* reiterates is the "plain view" principle. While government officials who are properly in a home or office can seize what is in plain view [*Coolidge* v. *New Hampshire,* 403 U.S. 464-72 (1971); *Harris* v. *United States,* 390 U.S. 234 (1968); see *Mancusi* v. *De Forte,* 392 U.S. 364 (1968)], even if they are in a public place, items not in view cannot be taken. Thus, in *Katz,* a conversation was held to be protected by the Fourth Amendment because the individual, although in a public telephone booth, intended that his conversation not be heard by others: it was not in plain "hearing." The application of *Katz* to the facts in *Terry* v. *Ohio,* 392 U.S. 1 (1968), similarly rested on a "plain view" principle. Thus, the Court held that, although an individual was on a public street, he was protected against unreasonable intrusion upon his person for objects not observable.

Identifying physical characteristics are similarly entitled to Fourth Amendment protection when they must be produced or created with the cooperation of the person in order to be in public view. *United States* v. *Harris,* 453 F.2d 1317, 1320 (8th Cir. 1972). Although handwriting is an often-used means of communicating, a grand jury

demand that a person make an exemplar on the occasion of an appearance clearly demonstrates that it is not something in plain view. Further, the very need of the government for the exemplar to make a comparison with writings it may already have demonstrates that the authorship of the exemplar is, indeed, very private.

The analogy made by both the government (brief at 15) and the court of appeals in *United States* v. *Doe* (*Schwartz*), *supra,* 457 F.2d at 898, of handwriting with facial features and visible scars or birthmarks underscores the point made here. Facial features are normally in plain view, and no cooperation or compulsion is needed to put them in such a state of observability.

Handwriting exemplars are like blood and fingerprints, both of which are protected against unreasonable intrusions. *Schmerber* v. *United States,* 384 U.S. 757 (1966); *Davis* v. *Mississippi,* 394 U.S. 721 (1969). Blood and fingerprints, like exemplars, are often exposed or available to the public. Yet, *Davis* v. *Mississippi, supra,* 394 U.S. 721, established the applicability of the Fourth Amendment to fingerprint samples although fingerprints are generally available identifying characteristics. The decision indicates that fingerprints can be taken without an arrest only if based upon a warrant premised on a showing of reasonableness. While a showing of probable cause to arrest for a crime would probably not be required in such a situation, what is clear from *Davis* is that fingerprints come within the scope of the Fourth Amendment.

Schmerber v. *California, supra,* 384 U.S. 757, similarly establishes that an intrusion by the government to obtain

a physical characteristic comes within the protections of the Fourth Amendment. Furthermore, while a physical intrusion is required to obtain blood, the compulsion exercised to secure handwriting exemplars is no less an intrusion [*United States* v. *Harris, supra,* 453 F. 2d 1317] since compulsion is the kind of intrusion necessary to secure the desired evidence. See *Morton Salt Co.* v. *United States,* 338 U.S. 632, 652 (1950).

II.

In its brief, the government suggests that the grand jury can subpoena non-testimonial evidence free from Fourth Amendment limitations, thus making irrelevant whether handwriting exemplars are covered by the Fourth Amendment (government brief at 19-20, 22 and 24).* As authority for this position, the government cites language from *Branzburg* v. *Hayes,* 33 L. Ed. 2d 626 (1972), and *Blair* v. *United States,* 250 U.S. 273 (1919), referring to the grand jury's broad investigative powers to compel appearance and testimonial evidence.

The government's position fails, however, to recognize the vital distinction between the requirement of appearance before a grand jury and a collateral demand for the production of evidence before that grand jury. While the grand jury admittedly can compel the appearance of any person, an additional demand for evidence is valid only if in accord with constitutional principles. Thus, a demand for testimonial evidence, including books and records, is limited by the Fifth Amendment. *Kastigar* v. *United States,* 33 L. Ed. 2d 212 (1972); *United States* v. *White,*

* The government concedes that the Fourth Amendment applies if a subpoena is overly broad, harassing or oppressive.

322 U.S. 694 (1944).* The restrictions of the Fifth Amendment are applicable to such demands even though the compulsory production of written, as well as oral, testimony is considered essential to the functioning of the grand jury. *Branzburg* v. *Hayes, supra*, 33 L. Ed. 2d 626; *Wilson* v. *United States*, 221 U.S. 361 (1961). There is no reason or judicial precedent for treating Fourth Amendment rights differently.

The government cites nothing that supports its view that, as to the Fourth Amendment, the grand jury is treated differently than other governmental agencies investigating criminal activities. No decision of the Court speaks of an unlimited power to secure non-testimonial evidence, and history provides no precedent for assuming that the grand jury has ever exercised such a power. In fact, prior to the cases now before the Court and several recent decisions of other federal courts,** there appears to be no reported instance of contested grand jury demands for non-testimonial evidence.

The government's proposal, if adopted, would leave the grand jury free to require the production of non-testimonial evidence without complying with the Fourth Amendment, permitting the government to do through the grand jury what it would otherwise be prohibited from doing. There

* Of course, a claim of privilege is not available to corporations or associations, or to individuals in custody of the books and records of such entities, *Curcio* v. *United States*, 354 U.S. 118 (1957); *United States* v. *White, supra*, 322 U.S. 694; *Hale* v. *Henkel*, 201 U.S. 43 (1906), or to those in custody of public records, *Shapiro* v. *United States*, 335 U.S. 1 (1948), or records kept for a public purpose, such as tax records.

** *United States* v. *Doe* (*Schwartz*), *supra*, 457 F.2d 895; *In the Matter of the Grand Jury*: *Riccardi* (Whipple, D.J., D.N.J. 1972).

is no reason for creating such an inroad in the protections afforded by that Amendment.

III.

There remains for consideration the standard required by the Fourth Amendment to seize physical characteristics. The government asserts that no standard should be imposed because it would interfere with the functions of the grand jury. To state the public need for the grand jury process, however, is merely to begin the balancing process required to arrive at the requisite standard. *Terry* v. *Ohio, supra,* 392 U.S. at 24, 27; *Camara* v. *Municipal Court,* 387 U.S. 523, 538-9 (1967).* The public need to have a grand jury "inquire into the existence of possible criminal conduct and to return only well-found indictments" (*Branzburg* v. *Hayes, supra,* 33 L. Ed. 2d at 643) combined with the grand jury's broad powers to obtain testimonial evidence is juxtaposed with the substantial right to be free from governmental intrusion. Balancing these, the standard which should be applied to permit a grand jury to demand production of handwriting exemplars is whether there is probable cause to believe that the handwriting of the witness is connected to the suspected criminal activity under investigation; that the identification procedure will materially aid in the determination of whether the person named committed the offense, and that the evidence is otherwise unavailable. At a minimum, the Court should adopt the standard suggested by the opinion of the court of appeals

* Thus, this case is quite different from *Branzburg* v. *Hayes, supra,* 33 L. Ed. 2d 626, where limits on the grand jury's power to obtain certain types of oral testimony was in issue. Here, the only issue is whether the grand jury's more questionable right to secure non-testimonial evidence can be subject to reasonable limitation.

in this case (Pet. App. A15-16). This standard, requiring a showing that the evidence demanded is relevant to the inquiry and that demand is not excessive, has long been the rule governing administrative subpoenas for corporate information. *Morton Salt Co.* v. *United States, supra,* 338 U.S. at 652-3; *Powell* v. *United States,* 379 U.S. 48 (1964).

Neither standard would interfere with the scope or nature of the investigation, merely with the tangible evidence that could be secured. Challenges to demands for handwriting exemplars are properly raised at the time the demand is made and do not involve the interference with the criminal process that was the subject of concern in *Blue* v. *United States,* 384 U.S. 251 (1966) and *Costello* v. *United States,* 350 U.S. 359 (1956). *Gelbard* v. *United States,* 33 L. Ed. 2d 179 (1972). Further, the proceeding should not be held *in camera* as the government urges. Such proceedings are antagonistic to the adversary system [*United States* v. *United States District Court,* 33 L. Ed. 2d 752, 770 (1972); *Alderman* v. *United States,* 394 U.S. 165, 180-85 (1969)] and are not necessary to protect the grand jury proceeding. As the opinion below makes clear, the affidavit need not contain the names of witnesses before the grand jury or the information obtained from them, but should come from the prosecutor's own investigation. Further, such a proceeding will not deter the grand jury from questioning witnesses, deliberating and voting. Since the witness is advised he is a suspect by the request for the handwriting, the chances that he will flee are not increased by the affidavit. Nor can the witness complain of being embarrassed by the information since he asks that it be revealed. Any danger to the criminal process can be met

by a showing by the government in a particular case of the need for an *in camera ex parte* proceeding.

In essence, the government seeks in this case to circumvent the protections afforded under the Fifth Amendment by urging that nothing in the Fourth Amendment prevents the grand jury from doing what it may not under the Fifth. Thus, the government seeks production of handwriting exemplars knowing that it cannot question the witness about the handwriting samples it already has. Stripped to its basics, the government's argument offers no meaningful precedent and relies on generalizations made in a different context as to the broad powers of the grand jury that have accumulated over the years. This is insufficient to establish the impropriety of a Fourth Amendment protection against a rather unique exercise of grand jury power not found in its history despite its broad power.

Conclusion

For the above stated reasons the judgment below should be affirmed.

Respectfully submitted,

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